

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

RONALD MARSICO

DECISION

For a License as a Private Investigator

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on April 23, 1991 and January 28, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 711 South Mountain Road, Box 2225, New City, New York 10956, was represented by Maureen McNamara, Esq., 7 Elmwood Drive, New City, New York 10956.

On April 23, 1991 the Division of Licensing Services was represented by David Horowitz, Esq. After Mr. Horowitz had completed his direct examination of the investigator assigned to the application, Ms. McNamara requested an adjournment without date to allow her to review the case with the applicant and to arrange to bring in additional witnesses. The adjournment was granted, and it was not until November 23, 1993 that I received a request from Ms. McNamara to restore the matter to the calendar. Mr. Horowitz having retired, the Division of Licensing Services was represented on January 28, 1993 by District Manager Bernard Friend.

ISSUE

The issue before the tribunal is whether the applicant has sufficient experience to qualify for a license as a private investigator.

FINDINGS OF FACT

1) By application dated January 22, 1990 the applicant applied for a license as a private investigator (Dept. Ex. 2). An investigation of the application was conducted, and by letter dated January 10, 1991 the applicant was advised by the Division of Licensing Services that it proposed to deny the application for reason of lack of any qualifying experience. In response, by undated letter received on January 25, 1991, the applicant requested an administrative hearing, notice of which was served on him by certified mail on March 1, 1991 (Dept. Ex. 1).

2) The applicant bases his application on the following experience:

a) January, 1985 to date of application. Worked for County Adjustment Bureau (County Adjustment), Mahopac, New York. Duties involved repossessing vehicles, including the tracing and surveillance of the debtors. Also served legal process, including locating the persons to be served. The applicant was treated as an independent contractor (Dept. Ex. 4 and 10), with no taxes withheld from his compensation, which amounted to \$2,275.00 in 1985 and \$2,601.13 in 1986 (Dept. Ex. 11). He went to the office 2 or 3 times a week to pick up assignments "on a spot basis" (Dept. Ex. 4), after which he was "turned loose" by the owner (trans. p. 54, line 4), and he was paid when he turned in his reports. He was not fingerprinted until April 23, 1985 and completed an employee's statement on May 6, 1985 (App. Ex. A).

b) January, 28, 1988 to date of application. Worked 30-35 hours per week for Taurus Investigative Agency, Inc. (Taurus), New City, New York. Duties involved surveillance in personal injury and divorce cases, skip tracing, asset searches, investigations regarding accidents, and the service of legal process, including locating the persons to be served (Dept. Ex. 13). The applicant was treated as an independent sub-contractor (Dept. Ex. 5 and 10), with no taxes withheld from his compensation, which amounted to \$8,207.00 in 1988 and \$6,818.35 in 1989 (Dept. Ex. 11). He went to the office 2 or 3 times a week, and submitted weekly activity sheets to the owner of the firm, with whom he was in frequent contact.

c) November 14, 1989 to December 18, 1992. Worked 40 hours per week for Bauer Investigations, Inc. (Bauer) Valley Cottage, New York. Duties involved investigations regarding personal injuries and insurance claims. The applicant was originally treated as an independent contractor, with no taxes withheld from his compensation, which was paid on a fixed weekly basis (Dept. Ex. 7). He was not fingerprinted until July 10, 1990 and completed an employee's statement on July 20, 1990 (Dept. Ex. 6). The basis of his association with Bauer was changed to that of employee, with taxes withheld, starting in the summer of 1991.

3) In addition to the experience which the applicant claims as qualifying, since October, 1987 he has also operated his own process serving agency, serving approximately ten documents a week in the evening or early morning, or during the weekend. He also has acted as an expert witness regarding automotive malfunctions in 3 accident cases, under the trade name "Ron Marsico Automotive Specialist" (Dept. Ex. 14).

OPINION

I- General Business Law (GBL) §72 establishes certain experience requirements which must be met by an applicant before a license as a private investigator may be issued:

"Every such applicant for a license as a private investigator shall establish to the satisfaction of the secretary of state...(that he) has been regularly employed , for a period of not less than three years, undertaking such investigations as those described as performed by a private investigator in subdivision one of section seventy-one of this article, as a sheriff, police officer in a city or county police department, or the division of state police, investigator in an agency of the state, county or United States government, or employee of a licensed private investigator, or has had an equivalent position and experience."

GBL §71(1) defines "private investigator" to "mean and include the business of private investigator and shall also mean and include, separately or collectively, the making for hire, reward or for any consideration whatsoever, of any investigation for the purpose of obtaining information with reference to any of the following matters...; crime or wrongs done or threatened against the government of the United States of America or any state or territory of the United States of America; the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation; the credibility of witnesses or other persons; the whereabouts of missing persons; the location or recovery of lost or stolen property; the causes and origin of, or responsibility for fires, or libels, or losses, or accidents, or damage or injuries to real property; or the affiliation, connection or relation of any person, firm or corporation with any union, organization, society or association, or with any official, member or representative thereof; or with reference to any person or persons seeking employment in the place of any person or persons who have quit work by reason of any strike; or with reference to the conduct, honesty, efficiency, loyalty or activities of employees, agents, contractors, and sub-contractors; or the securing of evidence to be used before any authorized investigation committee, board of award, board of arbitration, or in the trial of civil or criminal cases."

As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he has acquired the required experience. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

II- It has been held on several occasions that, inasmuch as unlicensed persons may conduct investigations on behalf of licensed private investigators only when those unlicensed persons are employees of the licensees, and not when they work as independent contractors, experience gained as an unlicensed independent contractor is unlawful and may not be used to qualify for a license as a private investigator. Application of Smith, 121 DOS 92; Application of Green, 13 DOS 90; Department of State v Bernstein, 58 DOS 87. That holding must, however, be applied in the light of the ruling in Gulla v Lomenzo, 344 NYS2d 962, 42 AD2d 592 (1973), which directed that experience credit be granted for work as an independent contractor in a situation where the applicant worked as an investigator for a single employer.

According to his application (Dept. Ex. 2), part of the time that the applicant worked for County Adjustment and Taurus overlapped. Therefore, he was not working for only one employer and cannot receive credit for the experience gained during that period (January 1988 through January 1990).¹ Further, since the applicant presented no evidence as to the actual hours that he worked for County Adjustment no credit can be granted for the period that did not overlap with his association with Taurus.

The only remaining experience is that gained with Bauer after the date of the application (January 22,1990) until the end of his association with that firm on December 18, 1992, which amounts to a total of 35 months. At the hearing the Division of Licensing Services conceded that the experience would be considered qualifying were it not for the question of the independent contractor status. In light of the above discussion, therefore, the applicant should be granted experience credit for those 35 months.

¹ Although other evidence presented at the hearing indicates that the applicant may have worked for County Adjustment and Taurus at different times, the statement in the application was made subject to penalty of perjury, and the applicant should be bound by that statement.

So as to avoid any future misunderstanding, it should be noted here that this decision in no way excuses licensed private investigators from their obligation not to hire unlicensed independent contractors to conduct investigations. Pursuant to GBL §81 a licensed private investigator must supervise the activities of his/her/its employees. Such supervision does not permit the treatment of such employees as independent contractors for tax or any other purposes. Department of State v Bernstein, supra.

CONCLUSIONS OF LAW

The applicant, having established that he has only 35 months of qualifying experience, has failed to meet his burden of establishing by substantial evidence that he has sufficient experience to qualify for a license as a private investigator. GBL §72; SAPA §306(1). Accordingly, his application should be denied.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §§72 and 79(2), the application of Ronald Marsico for a license as a private investigator is denied.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State